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IN THE

Supreme Court of the United States

FRANCINE A. GIANI,
Director, Utah Division of Consumer Protection,

Cross-Petitioner,

v.

AMERICAN TARGET ADVERTISING, INC.,

Cross-Respondent.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, IN SUPPORT OF GRANTING CERTIORARI

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. This Case Creates a Conflict between Federal Courts of Appeals and Partakes of the Confusion Among Lower Courts over the Proper Degree of Scrutiny. 3

II. This Case Presents Important Issues that Should Be Resolved by this Court 5

III. This Case Is an Appropriate Vehicle, and Waiting for an Uncertain Future Vehicle Would Impose a Significant, Ongoing, and Irreparable Burden. 7

CONCLUSION 8

TABLE OF AUTHORITIES

Pages

Cases

American Target Advertising, Inc. v. *Giani*, 199 F.3d 1241 (CA10 2000) 3, 4

Auburn Police Union v. *Carpenter*, 8 F.3d 886 (CA1 1993), *cert. denied*, 511 U.S. 1069 (1994) 4

Dayton Area Visually Impaired Persons, Inc. v. *Fisher*, 70 F.3d 1474 (CA6 1995), *cert. denied*, 517 U.S. 1135 (1996) 3, 4

Elrod v. *Burns*, 427 U.S. 347 (1976) 8

Healy v. *Beer Inst., Inc.*, 491 U.S. 324 (1989) 7

McGee v. *International Life Ins. Co.*, 355 U.S. 220 (1957) 5

New York v. *Ferber*, 458 U.S. 747 (1982) 5

New York v. *O'Neill*, 359 U.S. 1 (1959) 5

Riley v. *National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) 2

Special Programs, Inc. v. *Courter*, 923 F. Supp. 851 (E.D. Va. 1996) 4

Statutes

Utah Code Ann. § 13-22-2 6

Utah Code Ann. § 13-22-6 6

Utah Code Ann. § 13-22-9 ..... 6, 7

Utah Code Ann. § 13-22-12 7

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was established in 1981 to enable conservative men and women participate in the process of self-government and public policy making. Eagle Forum ELDF is interested in this case both as an entity potentially subject to numerous restrictions on speech and solicitation in its own fundraising activities, and because it believes that the freedom of all private citizens to speak, solicit support, and associate for the advancement and promotion of their core values is a fundamental prerequisite of self-government.

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant certiorari in this case (on both the Cross-Petition and the primary Petition in No. 99-1647) for several reasons. First, the Cross-Petition raises a split between the Sixth and Tenth Circuits over whether the First Amendment prohibits a State from requiring charitable solicitors to post a substantial bond against the off-chance that they might violate the law in the future. Both the Cross-Petition and the primary Petition also raise issues involving the proper level of scrutiny to be applied to regulations on charitable solicitation. Lower courts interpreting this Court's decision in *Riley* v. *National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), are currently confused over whether strict scrutiny must be applied to such regulations.

Second, the Cross-Petition and the primary Petition raise important issues of constitutional law that have not been, but should be, resolved by this Court. A federal court decision striking down a state law, by its very nature and by constitutional design, raises an important issue. While Eagle Forum ELDF agrees with that portion of the Tenth Circuit's decision invalidating Utah's bond requirement, such a ruling is of sufficient moment that it would benefit from the review and the imprimatur of this Court. The issues raised by the primary Petition also are of great importance insofar as the various burdens and the prior restraint on speech approved by the Tenth Circuit are replicated in numerous other States and localities, and consequently burden, chill, or forbid the core protected speech of hundreds of persons and organizations.

Third, this case presents a favorable opportunity for considering the issues presented concerning charitable solicitations because there are no apparent vehicle problems and the constitutional issues are cleanly presented. This Court should not wait for some uncertain future vehicle because the current confusion, as well as the multiplying state and local laws regulating charitable solicitation, create a cumulative burden

on charities that is significantly and irreparably impinging upon nationwide advocacy and solicitation.

ARGUMENT

While Eagle Forum ELDF believes that, on the merits, the Tenth Circuit was correct in striking down Utah's bond requirement and, indeed, should have struck down the other challenged provisions as well, it also believes that the degree of confusion and the existence of different standards in different jurisdictions make it imperative for this Court to establish some uniformity in this area. Eagle Forum ELDF therefore supports granting *both* the Cross-Petition and the primary Petition for certiorari in No. 99-1647.

I. This Case Creates a Conflict between Federal Courts of Appeals and Partakes of the Confusion Among Lower Courts over the Proper Degree of Scrutiny.

As Cross-Petitioner correctly points out, Cross-Pet. 15-17, there is a circuit split over whether a bonding requirement is permissible. *Compare American Target Advertising, Inc.* v. *Giani,* 199 F.3d 1241, 1250 (CA10 2000) (holding that "the bond/letter of credit provision of the Utah Act is unconstitutional on its face") *with Dayton Area Visually Impaired Persons, Inc.* v. *Fisher*, 70 F.3d 1474, 1486 (CA6 1995) (upholding Ohio's "$25,000 bonding requirement on professional solicitors"), *cert. denied*, 517 U.S. 1135 (1996).[2] The

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[2] The Tenth Circuit mistakenly viewed the Sixth Circuit's *Dayton* decision as involving only limited abuse-of-discretion review in the context of a preliminary injunction. *American Target Advertising*, 199 F.3d at 1249. Regarding those portions of the Ohio law that the district court enjoined, review was limited to the likelihood of success. But as to those portions of the Ohio statute sustained by the district court, the Sixth Circuit reviewed *and affirmed* the district court's dismissal of plaintiffs' claims against those provisions. *See* 70 F.3d at 1479-80 (district court "granted in part the defendants' motion to dismiss the claims brought by the plaintiffs"; finding jurisdiction "over all aspects of the plaintiffs' appeal"); *id.*

opportunity to resolve this conflict over the validity of essentially identical state laws is a compelling reason to grant the Cross-Petition and, by necessity, the primary Petition.

In addition, both the Cross-Petition and the Petition present this Court with the embedded question of what level of scrutiny to apply to regulations on charitable solicitation. Lower courts addressing this issue since *Riley* have been confused over whether to apply strict or intermediate scrutiny. Thus, in this case the Tenth Circuit held that the Utah Act, which applies only to "charitable" solicitations, "is content neutral, and we accordingly subject it to intermediate scrutiny." 199 F.3d at 1247. By contrast, the First Circuit in *Auburn Police Union* v. *Carpenter*, 8 F.3d 886, 893 (CA1 1993), *cert. denied,* 511 U.S. 1069 (1994), cited *Riley* and applied strict scrutiny to a state law that "applies to, and prohibits, only certain types of solicitation, necessitating an examination of the content of each solicitation in order to determine whether the Act's criteria are implicated." The First Circuit distinguished the law it was reviewing from a content-neutral restriction that applied to all solicitations, "whether commercial or charitable." *Id.*; *see also Special Programs, Inc.* v. *Courter*, 923 F. Supp. 851, 854 (E.D. Va. 1996) ("Nonetheless, the government may regulate charitable solicitations if such regulation is narrowly tailored to serve a compelling state interest; that is, the regulation meets strict scrutiny.")

Determining the level of scrutiny is the fundamental first step to virtually any challenge to regulations on charitable solicitation, and therefore confusion on this issue has wide-ranging effects. Resolving such confusion in this case will thus enhance uniformity and coherence in future cases involving a diversity of regulations and fact patterns.

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at 1490 (affirming the judgment of the district court). The Sixth Circuit's ruling affirming the dismissal of that portion of the complaint relating to the bonding requirement thus represents a full determination on the merits and squarely conflicts with the Tenth Circuit's ruling in this case.

II. This Case Presents Important Issues that Should Be Resolved by this Court.

Not only is this case important due to the conflict and confusion in the lower courts, but several of the issues presented by this case are themselves of sufficient substantive importance to warrant review by this Court. First, as presented by the Cross-Petition, the Tenth Circuit struck down a provision of state law requiring a $25,000 bond from entities engaged in charitable solicitation. Although Eagle Forum ELDF believes that decision was correct, it readily acknowledges that a federal court striking down a state law is a matter of substantial importance.

Second, the questions presented by both the Petition and the Cross-Petition affect the primary conduct of numerous persons, organizations, and governmental entities. Regarding the bonding requirement struck down by the Tenth Circuit, the decision below effectively invalidates any such requirements or potential requirements throughout all other jurisdictions in the Tenth Circuit, and casts doubt on such requirements everywhere else in the country except for the Sixth Circuit. The existence of comparable requirements in other jurisdictions has long been an important factor favoring a grant of certiorari. *See New York* v. *Ferber*, 458 U.S. 747, 749 (1982) (certiorari granted where Federal Government and 47 States had similar statutes to the one held unconstitutional); *New York* v. *O'Neill*, 359 U.S. 1, 3 (1959) (certiorari granted in case striking down state statute "inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico"); *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 221 (1957) (granting certiorari where the issue was important "not only to California but to other States which have similar laws").

Regarding the registration, licensing, and fee provisions upheld by the Tenth Circuit, the decision below will alter the

behavior and impose a burden on the speech of many hundreds of charities, solicitors, and consultants throughout the entire nation. Indeed, the law is sweeping in its coverage, requiring extensive information not only about the soliciting entities or advisors, but also about each individual solicitation conducted. *See* Utah Code Ann. §§ 13-22-6(1)(b)(v)-(viii), 13-22-9(1)(b)(vii)-(viii), Cross-Pet. App. 62-63, 68-70. Furthermore, the law's definition of charitable solicitation includes a truly staggering amount of protected speech. Thus, a "charitable solicitation" means "any request, *directly or indirectly*, for money, credit, property, financial assistance, or *any other thing of value* on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made *in any manner*, including: ... any oral or written request ... [or] the distribution, circulation, or posting of any handbill, written advertisement, or publication ...." § 13-22-2(b)(3), Cross-Pet. App. 53 (emphasis added). This definition seemingly encompasses all manner of communication – arguably including contribution forms in newsletters, e-mails, and web-site links[3] – seeking anything from money to *pro bono* professional services or other contributions of time, to miscellaneous contributions such as canned foods, clothing, medical supplies, or the like. When the remarkable apparent breadth of this law is combined with the nationwide scope of many charitable solicitations, the Utah Act can be seen to burden a vast amount of charitable solicitation by persons and groups all over the country.

Third, the cumulative impact of the Utah law and its analogues in other jurisdictions impose a tremendous burden on speech. When evaluating the importance of the issues in this case, the Court should consider not just Utah's Act in isola-

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[3] Indeed, the State of Utah has threatened to apply the Utah Charitable Solicitations Act to Eagle Forum based exclusively on Eagle Forum's web site, which contains a page allowing visitors to make contributions. *See* www.eagleforum.org/order/donate.html (June 15, 2000).

tion, but rather the synergistic impact of that law in combination with comparable laws that are or could be adopted in every other State and locality. *Cf. Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause implications of a statute must be evaluated by considering "what effect would arise if not one, but many or every, State adopted similar legislation"). Thus, while each individual fee of several hundred dollars may not alone seem onerous, when multiplied by the potential 50 States and countless localities regulating solicitation, the fees for a charity can become prohibitive. Furthermore, the requirements of each jurisdiction, although similar, are not identical, and thus create a trap for the unwary who miss one or another small detail required by one jurisdiction but not others. The multiplicity of regulations thus imposes a tremendous compliance cost – including legal fees – in order to avoid violations by inadvertence. Finally, because the Utah Act and its analogues have provisions making violation of one act potential grounds for denial of a license under another act, *see* §§ 13-22-9(1)(b)(xi), 13-22-12(1)(b)(ii), Cross-Pet. App. 71, 76, the effects of even an inadvertent error in one jurisdiction can bar solicitation throughout the nation.

III. This Case Is an Appropriate Vehicle, and Waiting for an Uncertain Future Vehicle Would Impose a Significant, Ongoing, and Irreparable Burden.

Neither party to this case has offered any objection to the appropriateness of this case for Supreme Court review. Rather, each side has merely reiterated that it believes itself to be correct on the merits. There are no apparent jurisdictional problems with the case and no intervening issues that would preclude reaching the constitutional questions raised.

Awaiting a possible alternative vehicle to address the issues presented here is undesirable given the irreparable injuries that will occur in the interim. In the preliminary injunction context, for example, it is axiomatic that violations of First Amendment rights constitute irreparable injury. *See El-*

rod v. *Burns*, 427 U.S. 347, 373 (1976). The same concerns favor granting certiorari in this case rather than waiting. Regarding the bonding requirement, although the Tenth Circuit correctly struck down that provision, charitable solicitors in the Sixth Circuit and elsewhere are having their First Amendment rights infringed, and may well be chilled from soliciting at all in certain jurisdictions until this Court settles the matter on a national level. And regarding the various other requirements of the Utah Act and its counterparts elsewhere, the burden on speech will be continuous, widespread, and irreparable until this Court rules on such requirements.

CONCLUSION

For the foregoing reasons, this Court should grant the Cross-Petition and the primary Petition (No. 99-1647) for certiorari.

Respectfully submitted,

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